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Office of Administrative Law Judges
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Issue Date: 20 August 2003

CASE NO.'s 2002-LHC-1791, 1792, 1793

OWCP NO.'s 18-75355, 76826, 77630

In the Matter of:

GEORGIA FISHER,
Claimant,

vs.

MARINE TERMINALS CORP., Employer,

and

MAJESTIC INSURANCE COMPANY, Carrier,

Respondents

and

CENTENNIAL STEVEDORING SERVICES, Employer,

and

HOMEPORT INSURANCE COMPANY, Carrier,

Respondents

Charles D. Naylor, Esq.
For Claimant

Maryann C. Shirvell, Esq.
For Marine Terminals Corp. / Majestic Insurance Co.

James P. Aleccia, Esq.
For Centennial Stevedoring Service / Homeport Insurance Co.

Before: **ANNE BEYTIN TORKINGTON**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Georgia Fisher ("Claimant") brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. § 901 *et seq.* against Marine Terminals Corporation ("MTC") and Centennial Stevedoring Service ("Centennial") and their carriers. A formal hearing was held in Long Beach, California on November 21, 2002, at which all parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits ("ALJX")1- 4,[1] Claimant's Exhibits ("CX") 1-18,[2] Marine Terminal/Majestic Exhibits ("MTCX") 1-27, and Centennial Stevedoring/Homeport Exhibits ("CENX") 1-15.[3] Transcript ("Tr") at 10-13.

On June 2, 2003, the parties' submitted their Post-Trial Briefs. These are hereby admitted as ALJX 5 through 7.[4] On July 9, 2003, the parties submitted supplemental briefs on the issue of average weekly wage. These are hereby admitted as ALJX 8 through 10.[5] Subsequent to the submission of the supplemental briefs, the parties were ordered to submit stipulations pertaining to the accuracy of their calculations of the average weekly wage, to be referred to as Joint Exhibits ("JX"). Two sets of stipulations were submitted, one between Claimant and MTC ("JX-1"), and one between Claimant and Centennial (JX 2). JX 1 and 2 are hereby admitted into evidence.

The parties submitted the following exhibits post-hearing: MTCX 28 and 29; CX 19; and, CENX 16.[6] These exhibits are hereby admitted to the record.

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[1]Administrative Law Judge's Exhibits are Claimant's Pre-Trial Statement ("ALJX 1"), Marine Terminal's Pre-Trial Statement ("ALJX 2"), Centennial's Pre-Trial Statement ("ALJX 3"), and the Director's Pre-Trial Statement ("ALJX 4").

[2]Upon examination of the evidence, it has been determined that no exhibit was submitted as CX 5.

[3]MTCX 26 was held in abeyance pending objections thereto by the other two parties after they had had an opportunity to examine it as this exhibit had not been served on the other parties until the morning of the trial. As no continuing objection has has been communicated to me since the beginning of the trial, MTCX 26 is hereby admitted to the record.

[4]ALJX 5 is Claimant's Post-Hearing Brief, ALJX 6 is Marine Terminal's, and ALJX 7 is Centennial's.

[5]ALJX 8 is Claimant's Supplemental Post-Hearing Brief, ALJX 9 is Marine Terminal's, and ALJX 10 is Centennial's.

[6]MTCX 28 is Dr. London's January 1, 2003 report; MTCX 29 is Dr. Miller's deposition transcript; CX 19 is Dr. London's deposition transcript; and, CENX 26 is Dr. Delman's deposition transcript. These exhibits have not been numbered sequentially to the exhibits admitted at trial, and will therefore be cited to by their individual page numbers.

Stipulations:

The parties agreed to the following stipulations:

1. Claimant injured her right foot and ankle at MTC on February 21, 2001;

2. Claimant allegedly aggravated her right hip and back in employment subsequent to February 21, 2001, when she returned to work after June 1, 2001, and worked for both MTC and Centennial;

3. Claimant worked for MTC on October 2, 2001;[7]

4. Claimant worked for Centennial on December 9, 10, and 11, 2001.[8]

5. Claimant underwent right hip replacement surgery on February 19, 2002;

6. The parties are subject to the Act;

7. Claimant and both Employers were in an employer-employee relationship at the time the alleged injuries occurred;

8. Claims for compensation against both employers were timely noticed and filed;

9. Claimant's average weekly wage at the time of the February 21, 2001 injury was $1,310.77, with a compensation rate of $873.10;

10. The injury to Claimant's ankle and foot on February 21, 2001, arose out of and in the course of employment at MTC;

11. Claimant is entitled to compensation and medical benefits for the above right foot and ankle injury;

12. Neither Employer/Carrier is currently providing compensation or medical benefits;

13. Although the parties do not agree as to whether Claimant has reached maximum medical improvement, it is not an issue in dispute before this court;

[7]MTC was Claimant's last employer on October 2, 2001.

[8]Centennial was Claimant's last employer on December 11, 2001.

14. Claimant is now working in light duty alternative employment, which she started on August 2, 2002.

Tr 6-8.

The Court accepts all of the foregoing stipulations as they are supported by substantial evidence of record. See *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

Issues in Dispute:[9]

1. Average weekly wage;

2. Causal relationship of right hip and low back disability to February 21, 2001 injuries to right foot and ankle;

3. Last responsible maritime employer for the low back and right hip injuries only;

4. Entitlement to temporary total disability for the following periods:

   a. February 22, 2001 through May 31, 2001;

   b. June 8, 2001 through June 25, 2001;

   c. October 3, 2001 through November 2, 2001;

   d. December 12, 2001 through August 1, 2002;

[9]In its Supplemental Closing Brief (ALJX 9, p.3-4), MTC argues that Claimant should be limited to recovery for a scheduled disability to her right foot and ankle for the period of June 1 through June 7, 2001, and should recover nothing for her back and right hip; MTC then states that Dr. London determined that Claimant has no permanent disability of the right foot and ankle. The issue of a scheduled injury to the right foot and ankle was never raised as an issue at the hearing. Moreover, it appears to be a "non-issue" since there is no medical evidence that Claimant is entitled to any permanent award for it. In addition, Section 8(c) provides for a scheduled injury to be paid "*in addition to* compensation for *temporary* total disability or *temporary* partial disability." [italics mine] As I find that Claimant did aggravate her right hip and low back partially as a result of the injury to her right foot and ankle on February 21, 2001 and the consequent limp that was caused by it, MTC is responsible for paying Claimant *temporary* partial disability during the period in question.

5. Entitlement to temporary partial disability for the following periods:

   a. June 1, 2001 through June 7, 2001;

   b. June 26, 2001 through October 2, 2001;

   c. November 3, 2001 through December 11, 2001;[10]

   d. August 2, 2002 through September 13, 2002, and continuing;

6. Section 7 benefits;

7. Attorney's Fees and Costs.

SUMMARY OF DECISION

The average weekly wage for all periods is Claimant's stipulated wage before her injury of February 21, 2001, or $1,310.77. MTC is the employer responsible for medical care and compensation for Claimant's right hip and low back disabilities from February 22, 2001 to December 11, 2001. Centennial is the employer responsible for medical care and compensation for Claimant's right hip and low back disabilities from December 12, 2001 to the present, and continuing. Both employers will be subject to the payment of appropriate and reasonable attorneys fees and costs to Claimant's counsel.

SUMMARY OF EVIDENCE

The Claimant

Claimant Georgia Fisher testified at the hearing on November 21, 2002. She was a remarkably frank and credible witness.

Claimant had right hip problems as a child which led to surgery at the age of approximately 12 years. Tr 32. After her childhood surgery she recovered completely. She had no continuing problems and no restrictions on her activities as a child, or as an adult. Tr 33-34. Claimant worked as a construction worker before her longshore career and had no problems with her hip or back. Tr 35-36. Claimant began working as a casual longshoreman in

[10]The parties stipulated that Claimant is not entitled to compensation for this period. JX 1, p.2. Therefore, this period of temporary partial disability is no longer an issue in dispute and will not be analyzed.

1997. Tr 36. She became a B-book member of the longshoremen's union in October 1998, Tr 37, and an A-book member in October 2000. Tr 38. Claimant performed a broad range of longshore work before she was injured on February 21, 2001. Tr 37-39. As a longshore UTR driver, when doing a lot of driving, claimant experienced some neck and back discomfort. Tr 39-40. She saw chiropractor Tim Ursich, D.C., for soreness in her neck and back and got occasional massages from him until the accident of February 21, 2001. Tr 40, CX p.10, 100-101. During this time she never complained of pain in her right hip,[11] Tr 40, and never had pain of the type she experienced after the February 21, 2001 accident such as pain radiating from her back or hip down her legs, numbness in the legs, cracking, popping or grinding in her hips. Tr 42-43. From the time Claimant began working as a casual longshoreman through her injury of February 21, 2001, she had no significant physical problems and performed all of her longshore duties without restrictions. Tr 42-45.

Claimant injured herself on February 21, 2001 when she stepped down from a hatch lid to the deck of a ship and inadvertently stepped onto a piece of rebar which was sticking up from the deck, causing her to twist or snap her ankle and fall back onto the hatch lid. Tr 45-46. Claimant had to be carried off the ship and taken directly to the hospital. Tr 49. The initial symptoms were primarily in the right foot and ankle. However, Claimant testified that as soon as her cast was discontinued,[12] she began to experience pain in her low back. She associated this pain with limping. Tr 54, 10-24.

In May, 2001 claimant changed treating physicians to James T. London, M.D., Tr 56, and on June 1, 2001 she was released to light duty longshore work on the casual board. Tr 57-58.[13] Claimant worked light duty from June through October 2, 2001, and experienced worsening back and right hip pain. Tr 63-65. Initially it was hard to discriminate between the right hip and low back pain. Tr 65.

On August 3, 2001 Claimant saw chiropractor Anderson complaining of low back and right hip pain due to "walking on cast." CX 7, p. 78. By then she was experiencing numbness and "pins and needles" as well as right leg pain. Tr 64-65, CX 7, p. 78. The pain had become so severe that Claimant sought treatment at the emergency room at San Pedro Peninsula Hospital on

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[11]In Exhibit 10, at page 101, Dr. Ursich notes that Claimant disclosed her childhood slipped epiphysis of the right hip and that notation is followed by two words which appear to read "bone pin" or "pain." Claimant explained at trial that it was her childhood belief that her slipped epiphysis had been repaired by placing pins in her right hip and that, therefore, she would have reported to Dr. Ursich that she had a "bone pin." Tr 168-169. Dr. Alan Delman, M.D., confirmed the customary procedure for repairing a slipped epiphysis is the insertion of a series of pins through the femoral neck up into the capital epiphysis, and that Claimant's reference to the procedure as "bone pins" was appropriate. CENX-16, p. 107-108.

[12]March 22, 2001, according to the records of then treating physician Michael Esposito, M.D. CX 3, p. 18.

[13]All of Claimant's work since the injury of February 21, 2001, has been on the longshore light duty, casual board, also referred to as the "Casualty Board." CX 19, p. 23, Tr 62.

August 12, 2001.[14] CX 9, p.86-98. At San Pedro Peninsula Hospital Claimant learned, as a result of x-rays taken, that her increasing symptoms might be related to her right hip, and she took those x-rays to Dr. London. Tr 77-78.

In August, 2001 Dr. London told Claimant that she did have a problem with the right hip, that she would need hip replacement surgery and that she should be working in a sedentary job, avoiding extended periods of standing, walking, or climbing because her work activities were wearing down her hip. Tr 78, CX 6, p. 49. Claimant continued to work through October 2, 2001. Her employer on October 2, 2001 was Marine Terminals Corporation. Tr 85, CX 12, p.132. She then saw Dr. Noel at Dr. London's recommendation and was placed, again, on temporary total disability. Tr 84-85, CX 8. While off work in October, 2001, Dr. London recommended lumbar epidural injections. CX 6, p.60. Claimant was unable to stay off work to have the epidurals because she was behind on house payments as Marine Terminals was not paying temporary disability. Tr 89. In addition, during the preceding months while she was working on the casual board Claimant got behind on her bills because she had to limit the number of days she could work as a result of hip and back pain. Tr 87-89. Because she was afraid she would lose her house, Claimant returned to work November 3, 2001.[15] Tr 89-91.

Between November 3, 2001 and December 11, 2001, Claimant worked more than she had the previous months because she was behind on her house payments. She took Vicodin to accomplish this. Tr 91-92. During this last period of work, her back and hip symptoms worsened. Tr 93. Claimant's last day of work before hip surgery was December 11, 2001, for Centennial Stevedoring.[16] CX 12, p. 132.

James T. London, M.D.

Dr. London was called as a witness for Claimant and testified in a perpetuation deposition after the trial on March 18, 2003. Dr. London is a board certified orthopedic surgeon. He spent one year at the Mayo Clinic on a fellowship for hip replacement surgery and ran a clinic at UCLA for people who had hip replacements. He has performed between 1500 and 2000 total hip replacement surgeries. CX 19, p.6.

Dr. London is Claimant's treating physician. He has treated her since May 8, 2001, CX 6, p. 35, to the present, including performing hip replacement surgery on February 19, 2002. CX 9, p. 98(e), (f), and (g). It is Dr. London's opinion that the February 21, 2001 injury played a role in

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[14]The pain was so severe that Claimant thought that she might have appendicitis. Tr 76-77. The doctor at the emergency room initially thought Claimant was currently passing a kidney stone. CX 9, p.91.

[15]Dr. London's chart note for October 29, 2001 contains the following statement attributed to claimant, "I have to work, I'm going broke. Please let me go back on casual board." (CX 6, p. 58)

[16]CX 12 p.132 reflects that the last three (3) days Claimant worked were December 9, 10 and 11, and were all for Centennial as a signalman.

causing the claimant's back and hip injuries. With respect to the back, Dr. London testified that the February 21st injury itself and Claimant's subsequent abnormal gait aggravated her low back. CX 19, p. 8-9. Describing how these factors combined to aggravate the low back, Dr. London testified "She had preexisting degenerative changes in her low back and the incident of 2/21/01 . . . [i]nitially in favoring her right ankle, she would have had an abnormal gate (sic) and it would have presented additional depressions [sic] on the degenerative changes in her back."[17] CX 19, p. 9, lines 6-13.

As to the right hip, Dr. London testified that the right hip became symptomatic in part from the February 21st injury itself and in part from the work the claimant did on the casual board after that injury. CX 19, p. 9. Dr. London testified regarding the specific trauma on February 21, 2001: "she came down forcefully on her right lower extremity when she stepped on something on February 21st. And that type of force, in my opinion, aggravated the degenerative change in her right hip." CX 19, p. 10. Dr. London explained that the right hip did not become symptomatic right away because Claimant was favoring her right lower extremity and, therefore, putting less weight on it and, further, because she was taking medication which can mask the pain. CX 19, p. 10.

Further, Dr. London testified that the prolonged standing required by Claimant's work on the casual board after February 21, 2001, aggravated her right hip problem and caused it to become symptomatic.[18] CX 19, p. 11-12. He explained that

> [t]he hip problem that she had and for which she had been operated on as an early teen, left her with a misshapen hip joint. In other words, the ball part of the hip joint wasn't round anymore. And that leads to excessive wear on the cartilage of the hip joint. And that wear concentrates the stresses on certain parts of the cartilage on the ball. And that can be aggravated by prolonged weight bearing stresses or the sudden application of stress across that cartilage interface.

CX 19, p.12.

Dr. London further testified that the prolonged standing associated with clerking and signal jobs, "can cause the pressure of the ball against the degenerated cartilage to further

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[17]The use of the word "depressions" in the quoted portion appears to be a transcription error by the court reporter. In the context of the doctor's testimony and the doctor's medical records contained in CX 6, it appears that the doctor used the word "stressors," not "depressions."

[18]In her trial testimony at pages 67-72, claimant described her work as a signalperson on the casual board, as requiring continuous standing and walking and no sitting. In addition, she described specific duties, such as placing a mark on the ground, and checking the cones on containers which required bending and squatting. On pages 72-74 claimant described her casual board job duties as a clerk: the jobs which allowed her to sit required her to get in and out of a vehicle periodically, and the jobs that did not allow for sitting required prolonged standing.

wear that cartilage and further damage it causing a progression of the arthritis." CX 19, p. 16. Dr. London also testified that the bending and stooping activities associated with casual work would tend to aggravate or accelerate the right hip condition by causing movement of the irregularly shaped ball within the irregularly shaped socket. CX 19, p. 17-18.

After Dr. London saw the x-rays taken at San Pedro Peninsula Hospital in August 2001, he prepared a report dated August 23, 2001, recommending that Claimant "begin to move to a sedentary job." CX 19, p. 18-19, CX 6, p. 49. Dr. London made that recommendation because he thought standing, walking, squatting and bending activities would aggravate or worsen Claimant's condition. Dr. London testified that in his opinion, all of the work Claimant did on the casual board, after February 21, 2001, aggravated both her right hip and back condition. CX 19, p. 21-22.

Geoffrey M. Miller, M.D.

Dr. Miller was called by MTC. His testimony was rendered in a perpetuation deposition taken on March 27, 2003. MTCX 29. Dr. Miller is a board certified orthopedic surgeon. He examined the claimant twice, on November 7, 2001 (MTCX 9) and on October 16, 2002 (MTCX 26).

In Dr. Miller's November 28, 2001 report (date of exam: November 7, 2001), he concludes that

> Ms. Fisher has a pre-existing hip disorder that occurred from a childhood injury and has left her with stiffness, that has led to some premature degeneration of the lumbar spine on the basis of natural progression, that would be present identically at this time absent the industrial injury. All the industrial injury did was add some additional mechanical stress to the low back, because of the ankle problem which made the symptoms more notable, but did not materially or substantially affect the overall level of impairment or disability, as the patient notes she is not even symptomatic when she is not particularly active.

MTCX 9, p.22.

In Dr. Miller's November 16, 2002 report (date of exam: October 16, 2002), he states:

> This case represents a classic problem of a patient who has a pre-existing condition that eventually decompensates, and she happens to be employed. . . . Whether or not one could argue that the low back was aggravated on the job is academic, as the symptoms have essentially disappeared after the [hip] joint replacement.
>
> . . . .
>
> Ms. Fisher is doing very well with minimal symptoms and a nearly normal physical exam despite working. This confirms my original opinion that the patient's real problem is an

> underlying decline in functional capacity of this 230 pound woman because of her right hip disease that was preexisting and long-standing, not an aggravation of industrial origin due either to the ankle injury which had almost fully recovered by the time her hip and back became symptomatic, and therefore was not logically a source of cumulative trauma, nor subsequent employment for the same reasons.

MTCX 26, p.285-286.

Dr. Miller maintained in his testimony that Claimant was doing well when he examined her on November 7, 2001, MTCX 29, p.26, for instance, she told him she could perform light duty. MTCX 29, p.8. He did note when it was pointed out to him, that Dr. London, who examined Claimant two days later on November 9, 2001, found that Claimant had painful motion on hip examination, whereas Dr. Miller did not find that. *Id*. at 75. Dr. Miller testified that he was unaware that Dr. London's chart note of September 19, 2001 stated that Claimant was complaining of pain and wanted hip surgery as soon as possible. MTCX 29, p.81-83.

Dr. Miller testified that since Claimant's hip had an abnormally shaped ball within the socket, it would wear out over a normal life, degeneration would take place over time secondary to use, "whenever she is using the hip it's causing forces to go through the hip," and this would include work activity between February 21 and December 11, 2001. MTCX 29, p.101-102. Dr. Miller conceded that it was possible that the more standing Claimant did at work, the more quickly her hip would degenerate. *Id.* at 105. Dr. Miller admitted that Dr. Noel's opinion that Claimant should not do longshore work indicates that such work would be harmful to her. *Id*. at 27. Dr. Miller indicated that if cumulative trauma were presumed (i.e., by a "fact finder"), then it did occur from November 7 through December 11, 2001. *Id*. at 27-28.

Dr. Miller testified that he disagreed with Dr. Delman, Centennial's expert, that the three days that Claimant worked at Centennial did not aggravate her hip or back, for three reasons: (1) Claimant was not a surgical candidate when he examined her on November 7, 2001, and her work activity was similar up to and including December 11, 2001, and decompensation took place subsequent to December 11, 2001, and not before. MTCX 29, p.33. However, Dr. Miller maintained that Claimant would not be subject to cumulative trauma on "casual duty." *Id.* at 38.

As to the effect of Claimant's limp on her hip and back symptoms, Dr. Miller stated, without conceding that the limp actually aggravated those conditions, that because "she had a stiff hip, and then when her ankle became involved, during that time frame, she became more aware of her limitations." MTCX 29, p.53.

Allan M. Delman, M.D.

Dr. Delman was called by Centennial and testified by perpetuation deposition taken after the trial on April 1, 2003. Dr. Delman is a board-certified orthopedic surgeon. Dr. Delman examined Claimant once, on September 19, 2002. The report of that examination was issued on October 21, 2002, and was admitted into evidence as CENX 4.

In Dr. Delman's October 21, 2002 report he states:

> In my opinion, Ms. Fisher has a slipped capital femoral epiphysis and secondary osteoarthritis of the right hip. This represents a pre-existing condition to the injury of February 11, 2001. In addition, the patient has lumbar stenosis with radiculopathy and facet arthrosis which also represents a pre-existing condition.
>
> The injury of February 21, 2001 aggravated the right hip and lumbar spine conditions. This conclusion is supported by the fact that the patient sustained a severe right ankle sprain and injury to the right foot with a documented prolonged period of tenderness and swelling. These findings were significant enough to warrant imaging studies of the ankle including both CT and MRI scans as well as prolonged conservative treatment. Based on the nature and extent of this injury, it is reasonable to conclude that the injury to the foot and ankle which resulted in prolonged pain and swelling produced a limp and abnormal gait that resulted in the development of symptoms in the previously asymptomatic lumbar spine and right hip. It is noteworthy that Dr. London, in his first report, mentions the complaint of low back soreness. Although the right hip pain developed later, towards late July or early August, the patient was still symptomatic from the right ankle at that time and furthermore differentiation between the lumbar and right hip symptoms was not easy as evidenced by the medical records and the report of Dr. Stanford Noel. In addition, there is no history or evidence that the patient engaged in any outside or nonindustrial activity that would result in the onset or development of lumbar or right hip symptoms from the previously asymptomatic conditions except for the right ankle injury of February 11 (sic), 2001 and the effect of the limp and abnormal gait with both daily activities and her work on the Casualty Board.
>
> In my opinion, the medical records clearly show that the three days of employment with Centennial Stevedoring Services did not result in injury to the right hip or lumbar spine nor is there any medical information or evidence that it resulted in either an aggravation of even exacerbation of these symptoms.
>
> The patient was clearly very symptomatic in her lumbar spine and right hip prior to the three days of work at CSS. She was sufficiently symptomatic that she told Dr. James London on September 19, 2001, well before her employment with CSS, that she wanted right hip surgery as soon as possible. The lumbar symptoms were sufficiently bad that Dr. James London recommended epidural injections on October 29, 2001, again well before

her three days of employment with CSS. The patient testified that the episode of increased right lower extremity symptoms when her leg became "paralyzed" occurred on 12-14-01 which is three days after her last day of employment at CSS. This increase in pain started without specific injury when she awoke in the morning. She further told me and testified that she worked a short shift at CSS and that no specific injury, event or unusual activity occurred in the three days of employment with CSS. In light of these factors which include the presence of clearly significant symptoms in the right hip and lumbar spine well before her employment with CSS, the absence of any significant inciting activity, event or injury during those three days and the three day delay between the onset of increased symptoms, there is no medical evidence that would support any relationship between the employment with CSS and either injury, aggravation or exacerbation of her lumbar and right hip symptoms. Furthermore, I would note that the symptoms that the patient described as occurring on December 14, 2001 with paralysis of the right lower extremity would be related to the lumbar stenosis and radiculopathy and not to the right hip.

It is medically reasonable to conclude that the patient's right hip and lumbar symptoms were worsened by a return to work following the February 21, 2001 incident. This conclusion is based upon the fact that her complaint of low back and right hip pain increased while she was working on the Casualty Board. Although the onset of symptoms is directly related to the original injury of February 21, 2001 to the right foot and ankle, the complaint of low back pain and right hip pain was apparently mild initially as evidenced by the paucity of mention in the medical records except for the initial report of Dr. James London. Once returning to the Casualty Board with a greater need for standing and walking activities while still symptomatic in the right foot and ankle, the symptoms developed in the case of the right hip and increased in the case of the lumbar spine. Therefore, I would conclude that the return to work worsened her right hip and lumbar symptoms.

CENX 4, p.17p-17q.

At his deposition, Dr. Delman testified that he found Claimant to be credible. CENX 16, p.6. Dr. Delman stated that the presence of an injury to the right ankle and foot that results in an abnormal gait and takes a long period of time to get better could certainly aggravate an underlying preexisting problem. *Id*. at 38. Dr. Delman reiterated the opinion in his report and further testified, again confirming his prior report, that he did not believe that Claimant's work at Centennial on December 9, 10 and 11, 2001, constituted an injury to her right hip or back. *Id*. at 28. It was Dr. Delman's opinion that since Claimant was symptomatic before she worked at Centennial on those dates, no aggravation or acceleration of her condition occurred during that time. *Id*. at 74-75. Dr. Delman also commented on Dr. London releasing Claimant to casual board work in his chart note of December 14, 2001,[19] subsequent to Claimant's work at

[19]There are two chart notes (actually "disability certificates") signed by Dr. London, one on December 14, 2001, and one on December 17, 2001. CENX 12, p.287; CX 6, p.67. Both certificates state that Claimant is

Centennial. Based on that chart note, Dr. Delman believed that Claimant was not a candidate for hip surgery at this time. *Id.* at 103. Dr. Delman also opined that since Dr. London did not make a note of Claimant's leg paralysis until Claimant's visit of January 18, 2002, this meant that Claimant had not had such paralysis until after January 14, when there was no such chart note. *Id.* In any case, Claimant's increase in symptoms with activity put her on a course to eventually have hip surgery. *Id*. at 106.

Dr. Delman further testified that evidence rather than speculation supported the worsening and aggravation of Claimant's right hip because of work after February 21, 2001. That opinion was:

> supported by the presence of substantial complaints in a reliable individual subsequent to a significant and substantial injury to her right foot and ankle that resulted in limping . . . [and] an abnormal gait. As her activities increased, her symptoms became more substantial. . . . [D]evelopment of symptoms in proximity to this accident, after all these years, suggest clearly that there's a relationship.

CENX 16, p.40-41.

Dr. Delman further opined that as cartilage wears down, symptoms increase, such as pain, popping and grinding. CENX 16, p.66. And weight bearing increases symptoms.

> [i]n the absence of weight bearing activities, the likelihood of this becoming a symptomatic problem is very small. It's the fact that the patient stands and walks and moves her hip that results in the symptoms associated with the condition.

CENX 16, p.65-66.

ANALYSIS

Responsible Employer

MTC has raised the issue of causality for all periods of Claimant's right hip and low back impairment. For the period after the February 2001 foot and ankle injury, for which MTC accepted responsibility, until Claimant completed three days of employment at Centennial on December 11, 2001, MTC argues that any problems Claimant had with her right hip and low back were not work-related. After December 11, 2001, MTC argues that even if Claimant's right hip

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temporarily totally disabled from December 14, 2001 to January 7, 2002. However, the one at CENX 12 also states that Claimant "can work casual board only for 2 months." Apparently the one dated December 17, 2001, was retroactive to cover temporary total disability as of December 14, 2001. In any case, Claimant did not return to any form of work after December 11, 2001.

and low back problems are work-related, Centennial is the employer responsible for such injuries because such work aggravated, accelerated, or combined with Claimant's pre-existing right hip and low back problems and created the ultimate disability she suffered after December 11, 2001. Centennial argues that those problems were a natural progression of her injury while working for MTC, and therefore MTC is the responsible employer. Claimant argues that MTC is the responsible employer from the date the right hip and low back problems developed, as such problems are causally related to the right foot and ankle injury she experienced at MTC on February 21, 2001, and MTC should continue to be the responsible employer to the present, because by not assuming responsibility for Claimant's medical care and temporary total disability and temporary partial disability, MTC forced Claimant to return to work prematurely which then caused the aggravation that ultimately resulted in Claimant undergoing a total hip replacement after December 11, 2001.

Because of the way the issues have been raised and argued, I will structure my analysis of the issues as follows: (1) whether MTC is responsible for Claimant's problems with her right hip and low back after the admitted February 21, 2001 injury to her right foot and ankle (causality); (2) whether MTC or Centennial is the responsible employer after December 11, 2001, the last day Claimant worked for Centennial.

Causality of Right Hip and Low Back Injuries After February 21, 2001 and Before December 11, 2001

An injury compensable under the Act must arise out of and in the course of employment. Section 20(a) of the Act provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). Thus, to invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). The presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *U.S. Industries/ Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615, 102 S.Ct. 1312, 1317 (1982) ("The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer.") However, a claimant is entitled to invoke the presumption if he or she presents at least "*some* evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). A claimant cannot, however, invoke the 20(a) presumption to prove that any work-related disability is permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441

(1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979). Nor may one employer invoke the 20(a) presumption against another in a dispute about which is the last responsible employer. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999).

Claimant is able to establish a *prima facie* case by invoking the Section 20(a) presumption. Drs. London and Delman both testified that the abnormal gait and limp that Claimant experienced following the right foot and ankle injury at MTC placed stress on her hip and low back, aggravating them, and causing her to have increasing pain, disability and limitations. Dr. London further testified that the mechanics of the actual injury to the right foot and ankle, was of sufficient force to aggravate her pre-existing hip condition. Both Dr. London and Dr. Delman testified that Claimant's continuing work on the casual board also aggravated her right hip and low back. Based on this evidence, Claimant has invoked the Section 20(a) presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). See also *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

MTC offers Dr. Miller's testimony to rebut the Section 20(a) presumption. Dr. Miller's testimony is insufficient to sustain MTC's burden. Dr. Miller states that Claimant became symptomatic, in that her symptoms became "more notable" due to the additional mechanical stress to the low back from the industrial injury to Claimant's right foot and ankle. However, Dr. Miller felt that stress did not "materially or substantially affect the overall level of impairment or disability." MTCX 9, p.22. As Claimant succinctly stated in her closing argument, Dr. Miller's thesis is that Claimant's increasing disability to her right hip and low back after February 21, 2001, was "coincidental." ALJX-5, p.12. Dr. Miller's testimony is unreliable for a number of reasons. He fails to provide any explanation as to why Claimant was able to do construction and longshore work for many years without any hip problems before the February 21, 2001 accident. Dr. Miller provides no plausible explanation for the rapid progression of Claimant's hip symptoms after that accident, ending in hip replacement surgery in February 2002. Dr. Miller is incorrect when he claimed in his final report, MTCX 26, p.285, that Claimant had documented pre-existing right hip pain before February 21, 2001. The only evidence in the record which Dr. Miller may have misconstrued as documenting right hip pain is Dr. Ursich's March 1, 1999 note referencing Claimant's "bone pin" discussed above at footnote 11, page 6. Dr. Miller must have misconstrued this note to mean "bone pain," not "bone pin." Even if he was correct in his interpretation, this is a rather slender thread upon which to support a medical opinion. Dr. Miller erred as well when he based his opinion on his one-time examination of Claimant on November 7, 2001; he stated Claimant told him she could perform light duty, and that she was therefore "doing well." MTCX

29, p.8, 26. Dr. London examined Claimant on November 9, 2001, two days after Dr. Miller, and found that Claimant had painful motion on hip examination. Dr. Miller testified that he was unaware of Dr. London's chart note of September 19, 2001, which documented Claimant's complaints of pain, and her request for hip surgery as soon as possible. MTCX 29, p.81-83. Dr. Miller did admit that whenever Claimant used her hip it would cause forces to go through the hip, and such use of the hip would include work activity. Dr. Miller conceded that because of that, it was possible that the more standing that Claimant did at work, the more quickly her hip would degenerate. *Id*. at 105. Finally, Dr. Miller had no trouble opining that if cumulative trauma were presumed (i.e., by a "fact finder"), then it did occur from November 7 through December 11, 2001, when MTC, the party who retained him, was not the employer.

When considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP,* 153 F.3d 1051 (9th Cir. 1998). However, a treating doctor's opinion is not necessarily conclusive regarding a claimant's physical condition or the extent of his disability. See *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989); *Amos,* 153 F.3d at 1054. Moreover, the court may reject the opinion of a treating physician which conflicts with the opinion of an examining physician, if the decision sets forth "specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Magallanes,* 881 F.2d at 751.

Because Dr. London's testimony is consistent and persuasive, and because, as Claimant's treating physician, he had the greatest opportunity to observe her over the course of her treatment from May 2001 to date, his opinions have the greatest evidentiary value, consistent with the *Amos* standard. Dr. Delman's opinion does not contradict Dr. London's regarding the issue under analysis. Dr. Miller's opinion lacks foundation, is speculative, is mis-informed, and is sometimes unreasonable. I had the impression upon reviewing his testimony and records that he was a lawyer rather than a doctor, so manipulative and argumentative did his exposition of the facts appear. For the foregoing reasons, I find Drs. London and Delman's opinions of more evidentiary weight than Dr. Miller's. Thus, MTC has not rebutted Claimant's Section 20(a) presumption.

Assuming arguendo that MTC had succeeded in its rebuttal, I find that after a careful review of all three doctors' opinions as well as Claimant's testimony, the preponderant evidence shows that Claimant's right hip and low back conditions were aggravated by the accident on February 21, 2001, when she injured her right foot and ankle, were further aggravated thereafter due to the limp which developed because of the initial injury to her right foot and ankle, and were again further aggravated by the walking and standing required by her work on the casual board while employed by MTC.

Whether MTC or Centennial is the Responsible Employer after December 11, 2001

Under the "last responsible employer" rule, the claimant's last employer is generally held liable for the entire resulting impairment, even though prior employers may have contributed to the claimant's disability. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623 (9th Cir. 1991). The Ninth Circuit recognizes two tests for determining last responsible employer, one for occupational disease cases, such as asbestosis, and another for multiple or cumulative trauma cases. If the disability is an occupational disease, the "last employer rule" provides that the employer which last exposed the claimant to injurious stimuli, prior to the date upon which the claimant became aware of her work-related disability, is the responsible employer. *Metropolitan Stevedore v. Crescent Wharf, et al., and Price* (hereinafter "*Price*"), ___ F.3d ___ (No. 01-71505) (9th Cir. August 13, 2003);[20] *Traveler's Insurance Co. v. Cardillo*, 225 F.2d 137, 145 (2nd Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In a multiple trauma case, the aggravation test or two-injury test (hereinafter, "the aggravation test") determines the "last responsible employer" based on the cause of the claimant's ultimate disability. Given the nature of Claimant's accident, and the parties do not disagree, the aggravation rule is the appropriate test for determining the last responsible employer in the instant case. The rule is applied as follows:

> If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding the subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury *aggravating, accelerating or combining with a prior injury* to create the ultimate disability, . . . the employer of the worker at the time of the most recent injury is the responsible, and therefore liable, employer.

Price, ___ F.3d ___ (citing *Foundation*, 950 F.2d at 624).

In *Price*, the court discussed the virtue of the "last responsible employer" rule. The court recognized that it might seem harsh to assign liability to Metropolitan, the last employer for whom the claimant had worked for only one day, that day followed by knee surgery scheduled several months prior, and when claimant had been suffering from a knee condition for years. The court explained that the rule allowed each employer subject to the Act to share the risk.

> The unfairness to the last employer is mitigated by two factors: the spreading of the risk through mandatory insurance, and the availability of the second injury fund to the last employer in some cases. As the court stated in *Foundation Constructors*, "this rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time." *Foundation*, 950 F.2d at 623. Having a bright line rule eliminates the need for costly litigation and helps

[20] http://caselaw.lp.findlaw.com/data2/circs/9th/0171505p.pdf

ensure that workers receive timely and adequate compensation for their injuries under the LHWCA.

Price, ___ F.3d ___(p.11298).

MTC contends that Claimant suffered a new injury while employed by Centennial on December 9 through 11, 2001, and that Centennial is therefore the last responsible employer. Claimant[21] and Centennial contend that Claimant did not suffer a new injury during that period, and that MTC is therefore the responsible employer. Because Claimant does not allege that she suffered an injury while working for Centennial, MTC cannot invoke the Section 20(a) presumption to prove that Claimant suffered a new injury while employed by Centennial. *Buchanan*, 33 BRBS 32.

MTC's contention that Claimant aggravated her right hip and low back while working at Centennial is supported by the testimony and reports of Dr. London and Dr. Miller. Centennial's contention that Claimant's did not aggravate her right hip and low back while working for Centennial, but rather that her worsening condition after December 11, 2001 is attributable to the natural progression of her right hip and low back injuries, is supported by Dr. Delman. Because I find Dr. London the most reliable of the three experts, I rely on his opinion that Claimant did aggravate her low back and right hip while working for Centennial, and therefore find that Centennial is the last responsible employer after December 11, 2001, her last day working there.

As iterated above, Dr. London testified extensively regarding the aggravation to Claimant's right hip and low back caused by the walking, standing, bending and stooping required by her work off the casual board. CX-19, p.17-18. She repeated such activity while working for Centennial on December 9, 10 and 11, 2001. *See* footnotes 16 and 18 above, and MTCX 10, p.44. After Dr. London saw the x-rays taken at San Pedro Peninsula Hospital in August 2001, he stated in his report dated August 23, 2001, that Claimant should begin to move to a sedentary job, CX-19, p.18-19, CX 6, p.49, because all of the work Claimant did on the casual board after February 21, 2001 aggravated both her right hip and back condition. CX 19, p.21-22.

Dr. London testified directly that Claimant's work from November 3, 2001 through December 11, 2001, aggravated her hip and back conditions. CX 19, p.22. He further testified that the three days Claimant worked for Centennial in December 2001 resulted in a permanent worsening of Claimant's right hip condition because Claimant was symptomatically worse and required hip replacement surgery in February 2002 that he would not have anticipated. CX 19, p.35.

[21]Since Claimant's position on this issue is a moral rather than a medical one, it is not inconsistent with the finding that she aggravated or accelerated her hip and back injuries while working at Centennial. Further, as the *Price* case points out, the last employer rule while sometimes harsh, serves the purpose of spreading the risk among the employers and, in the long run, simplifying the process of obtaining benefits for the claimant.

Claimant herself testified at trial that her symptoms got worse from November through her last day of work at Centennial on December 11, 2001, and that she was no longer able to work after that. Tr 93. Adding further weight to her testimony, the record reflects that Claimant worked more hours in November and December 2001 than she had at MTC for September and October of 2001. Claimant worked 100 hours in September 2001, 5 hours in October 2001, and 114 hours in November 2001. MTCX 22, p.244. In December, she worked 52 hours during the 11 day period from December 1 through 11, 2001. *Id*.

Based on the evidence of record, Claimant's symptoms dramatically increased after she stopped work at Centennial on December 11, 2001. She awoke with paralyzing pain in her right leg within days after.[22] At the trial, Claimant testified that she "woked (sic) up and my right leg had no feeling to it. It felt cold and dead and numb." Tr. p.97-98. Moreover, she could no longer work.

Finally, Claimant and Dr. London now agreed that Claimant must undergo right hip replacement surgery.[23] Claimant had foregone that surgery prior to working for Centennial, although she was in a great deal of pain, based on Dr. London's advice that she should wait as long as she could before having the surgery.[24] See, e.g., MTCX 12, p.132.

Dr. London's opinion, coupled with evidence that Claimant could no longer work, had paralyzing pain in her right leg for the first time, and no longer could wait for hip replacement surgery all support the conclusion that Claimant's right hip injury, along with her low back injury, became worse after working for Centennial. Thus, it is reasonable to conclude that Claimant aggravated her right hip and low back from December 9 through 11, 2001, when she worked for Centennial.

Centennial cites Dr. Delman in support of its position that Claimant did not aggravate her right hip and low back while working for Centennial. He explains his position by stating that no aggravation took place at Centennial because Claimant "was already substantially symptomatic prior to that time period."[25] CENX 16, p.75. However, this statement does not imply that

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[22]It is not clear on what precise date Claimant woke with paralyzing pain in her right leg. According to the evidence of record, it varies from December 12, (MTCX 26, p.281), to December 14, 2001 (Tr 96, 129-130),to December 15, 2001, (MTCX 10, p.46), to December 16 or 18, 2001 (CENX 14, p.653-54).

[23]Indeed, Dr. London testified that Claimant's work activities on December 9, 10 and 11, 2001, contributed to Claimant's need for hip surgery. CX 19, p.95

[24]Claimant testified that Dr. London told her in August "that he would do the [hip] surgery when I crawled in his office and couldn't walk anymore." MTCX 10, p.53.

[25]The facts in the *Price* decision are even more compelling than the facts in this case. There, the claimant had pre-existing bilateral knee injuries, to the extent that his doctors opined that his knees were "bone on bone," i.e., with no cartilage left. The claimant had knee surgery scheduled four months prior to his injury at Metropolitan, the employer determined to be the "last responsible." The claimant worked only one day for

Claimant's symptoms did not increase after she worked at Centennial for the three days from December 9 to 11, 2001. And the evidence of record supports a substantial increase in Claimant's symptomatology after her stint at Centennial. Therefore, Dr. Delman's statement does not effectively rebut the change in Claimant's state after working at Centennial, a change that caused paralysis of her right leg, an inability to work, and required her to undergo hip surgery.

In addition, Dr. Delman testified at his deposition that "prolonged standing, prolonged walking over a period of time can aggravate symptoms associated with hip arthritis." CENX 16, p.78-79. Claimant engaged in prolonged standing and walking from November 3, 2001 through December 11, 2001, when she worked on the waterfront for 166 hours, and she worked 8 hour shifts for each of the three days that she worked at Centennial from December 9 through 11, 2001. MCTX 22, p.244.

Centennial argues that Dr. London's opinion should be discounted because he is not really Claimant's treating physician since she was initially sent to him by MTC. While the initial referral was due to MTC, Claimant has chosen to treat with Dr. London since May 2001 and has seen him on numerous occasions since then. Dr. London performed Claimant's total hip replacement in February 2002, and continues to treat her to date. It is unreasonable, if not disingenuous, to declare that he is not her treating physician based upon the initial referral from one respondent.

Centennial also asks the court to discount Dr. London's credibility based on his failure to render an opinion prior to his deposition on March 18, 2003, regarding whether Claimant's hip and back aggravation was causally related to the February 21, 2001 injury to her right foot and ankle. Centennial contends that one should deduce that this failure is related to Dr. London's bias in favor of MTC, which originally retained him to examine Claimant in May 2001. Centennial points out that two of Claimant's attorneys, Mr. Pranin and Mr. Naylor, wrote letters to Dr. London, requesting his opinion on causality. Dr. London did not respond. These facts are insufficient to show bias. Nothing in the record explains Dr. London's failure to respond to those requests. I can only assume that Dr. London was busy treating Claimant, and did not see his role as an expert in the course of litigation until he was deposed for that purpose. In any case, I cannot reach a definitive conclusion as to Dr. London's motives before March 2003. I do know that the record is replete with evidence that he gave Claimant excellent treatment and that she had and has full confidence in him. Further, Dr. London's testimony in his deposition is precise, consistent and clear. Coupled with the deference the fact finder owes to the treater, I find that Dr. London's testimony is the most reliable and least biased of the three doctors who have testified in this case.

Metropolitan before he underwent that surgery. Here, Ms. Fisher worked three days for Centennial, did *not* have hip surgery *scheduled before* working there, and scheduled and underwent such surgery *after* working for Centennial.

I conclude, after a thorough review of the relevant evidence, that Centennial is the employer responsible for Claimant's compensation and medical care after December 11, 2001, because I find that she did aggravate her right hip and back during the three days that she worked for Centennial.

Average Weekly Wage

There is no dispute regarding Claimant's average weekly wage preceding her injury on February 21, 2001. The parties have stipulated that it is $1,310.77, which yields a compensation rate of $873.10. The parties dispute the method of calculation of the average weekly wage preceding all periods of temporary disability starting on June 25, 2001. Claimant contends that the calculation of her average weekly wage for periods of temporary disability should account for her *temporarily* reduced earning capacity and should therefore not be based on her sporadic attempts to perform light duty off the casual board. Both respondents, MTC and Centennial, argue that each period of temporary disability for which they are found responsible (after June 25, 2001, in the case of MTC and after December 11, 2001 in the case of Centennial) should be based on the 52 weeks of Claimant's earnings preceding that period. I conclude that the law and equity support Claimant's position.

Section 10 of the Act provides for three methods for determining the appropriate average weekly wage of an injured worker, set forth in subsections (a), (b) and (c). Section 10(a) applies when an injured worker worked in the same employment for substantially the whole of the year immediately preceding the injury. Section 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. When Sections 10(a) or 10(b) "cannot reasonably and fairly be applied," Section 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). Section 10(c) does not prescribe a fixed formula but requires the ALJ to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 910(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).

The parties do not dispute that Section 10(c) is the proper section to apply, although they do disagree as to what methodology to use. In addition, Claimant did not work "substantially the whole of the year" as required by Section 10(a) as she only worked approximately 22 weeks[26] from December 12, 2000 to December 11, 2001.[27] Moreover, there are good reasons for

[26]This figure is based on JX-2, p.2, and is a composite of hours worked after February 22, 2001 and weeks worked from December 14, 2000 to February 21, 2001.

[27]The seminal Ninth Circuit case in this area, *Matulic v. Director*, 154 F.3d 1052 (1998) uses any figure that is more than 75% of the workdays of the measuring year as the standard of "substantially the whole of the year." Twenty-two weeks or approximately 120 days is well below the 75% benchmark.

applying Section 10(c) in this case. Claimant was either on temporary total or temporary partial disability for all periods between February 21, 2001 and December 11, 2001. Claimant's earnings while *temporarily* partially disabled after February 21, 2001, are not an appropriate gage of her earning capacity because her work hours were reduced substantially when compared with her pre February 21, 2001 work hours.[28] Because all of Claimant's post February 21, 2001 earnings were on temporary light duty, and because the uncontradicted evidence establishes claimant's symptoms post February 21, 2001 limited the quantity of work she performed on the light duty casual board, Claimant's post February 21, 2001 earnings do not "reasonably represent the annual earning capacity of the injured employee." 33 U.S.C. §910(c). On the other hand, Claimant has a full year of unrestricted longshore earnings immediately prior to the February 21, 2001 injury. It is reasonable to use that year's earnings to determine Claimant's average weekly wage. It is also possible to use the method discussed in *Strand v. Hansen Seaway Service, Ltd.*, 9 BRBS 847, (1979), *aff'd in part and rev'd in part*, 11 BRBS 732, 614 F.2d 572 (7th Cir. 1980) which reconstituted the wages during the period of temporary disability to account for a claimant's lost work hours during periods of temporary partial disability and total lack of earnings during periods of temporary total disability, producing a new average weekly wage for that period.

Strand arose from the circumstance of two on-the-job injuries to a longshoreman in Milwaukee. The first injury occurred August 26, 1974 and the second on April 25, 1975. As a result of temporary total disability from the first injury, the claimant only worked 29 weeks of the 52 weeks preceding the second injury. Because of the limited time claimant worked in the 52 weeks preceding the second injury, the Court applied Section 10(c) of the Act to determine the average weekly wage. In the 29 weeks claimant worked before the second injury he earned $7,301.68. Moreover, the Court found that but for the first injury claimant would have worked an additional 18 3/7 weeks. Noting that claimant's weekly salary in 1974 (the year before the second injury) was $316.53 per week, the administrative law judge concluded claimant would have earned an additional $5,833.20.[29] The administrative law judge determined that "claimant's annual earning capacity in the year prior to his second injury was the sum of the wages actually earned and wages he would have earned" or $13,134.88. The administrative law judge then divided that sum by 52 weeks to determine the average weekly wage.

In her Supplemental Closing Brief on this issue, and in JX 2, where the calculations were corrected for accuracy, Claimant used the *Strand* case to calculate Claimant's average weekly wage during the 52 weeks preceding December 11, 2001. Such calculations produced an average weekly wage of $1,565.12, which exceeds the one for the period preceding the February 2001 injury by $254.35 ($1,565.12 - $1,310.77 = $254.35). It does not seem reasonable, and is certainly unfair to conclude that Claimant's average weekly wage while in a temporary disability

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[28]In the 52 weeks prior to the February 21, 2001 injury Claimant averaged 33.33 hours per week, while in the post February 21, 2001 work periods, Claimant averaged only 23.19 hours per week. CX 12, p.139-140; JX 2, p.2.

[29]18 3/7 weeks x $316.53 = $5833.20.

status should exceed the one she earned before she became disabled. Thus, I conclude that the most reasonable and equitable average weekly wage for the temporary disability periods following the February 21, 2001 injury is the average weekly wage Claimant earned in the 52 week period before that injury, i.e., $1,310.77.

MTC argues that Section 10(c) should apply, but that the claimant's average weekly wage should be re-calculated based on the period prior to each period of temporary total disability and temporary partial disability starting on June 25, 2001. In support of this proposition, MTC quotes *Del Vacchio v. Sun Shipbuilding & Dry Dock Company*, 16 BRBS 190, 193 (1990):

> Compensation benefits must be based upon the claimant's average weekly wage at the time of the injury for which compensation is claimed. A work-related aggravation of a pre-existing injury is compensable in itself under the Act and is considered a new injury. [citation omitted] Therefore, the average weekly wage in aggravation cases must be based on the claimant's earnings at the time of aggravation.

The *Del Vacchio* claimant was working and in a permanent status when he suffered the second injury. He argued that the wages he was earning at the time of the second injury reflected his wage earning capacity, not the wages he earned at the time of his first injury in 1973. The case before me is distinguishable because Ms. Fisher was in a temporary status when she experienced her second injuries, both at MTC and at Centennial. Therefore, it would be unfair to base her wage-earning capacity on a period when her wages had diminished because she was recovering from a work-related injury, and had not yet reached her true earning potential. I conclude that *Del Vacchio* does not apply.

Centennial also argues that Section 10(c) should apply and suggests that Claimant's average weekly wage before her injury of December 11, 2001, should be based on the $37,797.59 she earned in the 52 weeks preceding that date, divided by 52 per Section 10(d). That calculation yields an average weekly wage of $726.87, and a compensation rate of $484.60. For the reasons stated at the outset of this analysis, it would be grossly unfair as well as not reasonably representative of Claimant's true earning capacity, to base her average weekly wage on earnings she made while in a temporary disability status. Therefore, I reject Centennial's argument, and conclude that Claimant's average weekly wage for all periods of temporary partial and total disability after February 21, 2001, is $1,310.77.

Having determined which is the responsible employer and for what period, I must now address all disputed periods of temporary total disability and temporary partial disability.

Entitlement to Temporary Total Disability

February 22, 2001 through May 31, 2001 and June 8, 2001 through June 25, 2001

MTC paid temporary total disability benefits to Claimant for the period February 22, 2001 through May 31, 2001, at the rate of $863.80 a week, for a total of $12,216.72. JX 1, p.2. Additionally, temporary total disability benefits were paid by MTC to Claimant for the period June 8, 2001 through July 13, 2001, at the rate of $863.80 a week, for a total of $4,442.49. *Id*. The parties stipulated at trial that Claimant's compensation rate at the time of the February 21, 2001 injury was $873.10. Claimant alleges an underpayment of temporary total disability benefits for the period February 22, 2001 through May 31, 2002 and June 8, 2001 through June 25, 2001, in the amount of $274.61. MTC offers no rebuttal. Therefore, Claimant is entitled to an award of $274.61 with interest for these two periods of temporary total disability.

October 3, 2001 through November 2, 2001

Based on my finding that MTC is the responsible employer for the aggravation of Claimant's right hip and low back for this period, it must therefore pay Claimant temporary total disability for this period at the compensation rate of $873.10 per week, with interest thereon.

December 12, 2001 through August 1, 2002

As Centennial has been determined the responsible employer as of December 12, 2001, and continuing, Centennial must pay Claimant $873.10 per week for this period.

Entitlement to Temporary Partial Disability

June 1, 2001 through June 7, 2001

The parties have stipulated that for the period June 1, 2001 through June 7, 2001, Claimant had total earnings of $507.37. Utilizing an average weekly wage of $1,310.77, the claimant's loss of wage earning capacity for this period is $803.40 a week. This establishes a temporary partial disability compensation rate of $535.60 for this one week period. MTC is the responsible employer for this period and must pay this amount.[30]

[30]MTC has raised an argument as to why it should not have to pay Claimant for this period. That argument is fully addressed above at note 9, p.4.

June 26, 2001 through October 3, 2001

For the 14 2/7 weeks from June 26, 2001 through October 3, 2001, Claimant had total earnings of $12,975.43, establishing an average weekly wage of $908.64. JX 1, p.2. For that period of time, Claimant had an average weekly wage loss of $402.13, which would render a temporary partial disability compensation rate of $268.08 per week, for a total of $3,827.33, plus interest. MTC is the responsible employer for this period and therefore must pay Claimant that amount.

MTC claims an overpayment of temporary total disability benefits for the period June 25, 2001 through July 13, 2001, in the amount of $2,344.32. JX 1, p.2. To the extent MTC has paid Claimant benefits for that period, it is entitled to a credit against the total amount owed for the period June 26, 2001 through October 3, 2001.

August 2, 2002 through September 13, 2002, and Continuing

Claimant had total earnings of $3,621.72, establishing an average weekly wage of $589.86. For that period of time claimant had an average weekly wage loss of $720.91 which would render a temporary partial disability compensation rate of $480.60 per week. For this 6 1/7 weeks claimant would be entitled to $2,950.88. As Centennial is the responsible employer for this period, it must pay Claimant that amount with interest, and continue paying Claimant temporary partial disability for the periods she is able to work after September 13, 2002, and continuing.

Attorney's Fees and Costs

Under Section 28 of the Act, a claimant may recover reasonable and necessary attorney's fees and costs associated with the "successful prosecution" of his or her claim. 33 U.S.C. § 928. Claimant is entitled to reasonable attorney's fees and costs for work done on the issues upon which she prevailed.

CONCLUSION

The average weekly wage for all periods is Claimant's stipulated wage before her injury of February 21, 2001, or $1,310.77. MTC is the employer responsible for medical care and compensation for Claimant's right hip and low back disabilities from February 22, 2001 to December 11, 2001. Centennial is the employer responsible for medical care and compensation for Claimant's right hip and low back disabilities from December 12, 2001 to the present, and continuing. Both employers will be subject to the payment of appropriate and reasonable attorneys fees and costs to Claimant's counsel.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, the Court issues the following order:

1. MTC shall pay Claimant temporary total disability for the following periods at the compensation rate of $873.10 per week: February 22, 2001 through May 31, 2001; June 8, 2001 through June 25, 2001; October 3, 2001 through November 2, 2001.

2. MTC shall pay Claimant temporary partial disability for the following periods and at the following weekly rates: June 1, 2001 through June 7, 2001, at the rate of $536.60; June 26, 2001 through October 3, 2001, at the rate of $268.08;

3. Centennial shall pay Claimant temporary total disability for the period December 12, 2001 through August 1, 2001, at the rate of $873.10 per week;

4. Centennial shall pay Claimant temporary partial disability at the weekly rate of $480.60 for the period August 2, 2002 through September 13, 2002, and shall continue paying Claimant temporary partial disability for the periods she is able to work after September 13, 2002, at a rate to be determined based on her earnings;

5. MTC and Centennial shall pay interest on each unpaid installment of compensation from the date the compensation became due. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director. See 28 U.S.C. §1961.

6. MTC and Centennial are entitled to a credit for benefits already paid;

7. All computations are subject to verification by the District Director who in addition shall make all calculations necessary to carry out this Order;

8. MTC shall pay all Section 7 medical benefits related to Claimant's right hip and low back injuries from February 22, 2001 through December 11, 2001;

9. Centennial shall provide Claimant with all Section 7 medical benefits related to her low back and right hip commencing December 12, 2001, to the present and continuing, and all the medical care that may in the future be reasonable and necessary for the treatment of the sequelae of her injuries;

10. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on counsel for both Employers within 21 days of the date this Decision and Order is served. The petition should contain Claimant's counsel's estimate of what proportion of the fees and costs should be assumed by each of the employers. Counsel for Employers shall each provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. After receipt of the intial Petition for Fees and Costs, and the initial Objections thereto, the court will issue an order determining the proportion of fees and costs each employer shall pay. Within ten calendar days after service of the court's order, Claimant's counsel shall initiate a verbal discussion with counsel for Employers in an effort to amicably resolve as many of Employers' objections as possible. If the counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of the court's order, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employers, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employers no later than 30 days after service of the court's order. Within 14 days after service of the Final Application, Employers shall file Statements of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge